

No. 48949-0-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

STEVEN BRIAN YELOVICH,

Appellant.

On Appeal from the Pierce County Superior Court
Cause No. 15-1-02224-7
The Honorable Jerry Costello, Judge

OPENING BRIEF OF APPELLANT

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TABLE OF CONTENTS

I.	ASSIGNMENTS OF ERROR	1
II.	ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR.....	1
III.	STATEMENT OF THE CASE.....	3
	A. PROCEDURAL HISTORY.....	3
	B. SUBSTANTIVE FACTS	3
IV.	ARGUMENT & AUTHORITIES	6
	A. YELOVICH WAS ENTITLED TO A SELF- DEFENSE/DEFENSE OF PROPERTY JURY INSTRUCTION BECAUSE A PERSON IS ENTITLED TO USE REASONABLE FORCE TO RETRIEVE STOLEN PROPERTY AND BECAUSE THE FACTS SUPPORT THE INSTRUCTION IN THIS CASE.....	6
	B. THE TRIAL COURT ABUSED ITS DISCRETION AND DENIED YELOVICH A FAIR TRIAL WHEN IT ALLOWED THE STATE TO REOPEN ITS CASE AFTER THE DEFENSE RESTED EVEN THOUGH THE STATE'S FAILURE TO CALL DE ARMOND SOONER WAS DUE TO THE STATE'S OWN MISMANAGEMENT	10
	C. ANY FUTURE REQUEST FOR APPELLATE COSTS SHOULD BE DENIED	13
V.	CONCLUSION	16

TABLE OF AUTHORITIES

CASES

<u>State v. Brinkley</u> , 66 Wn. App. 844, 837 P.2d 20 (1992).....	11-12
<u>State v. Grant</u> , 2016 WL 6649269 (2016)	13
<u>State v. Hudlow</u> , 99 Wn.2d 1, 659 P.2d 514 (1983)	6
<u>State v. Hughes</u> , 106 Wn.2d 176, 721 P.2d 902 (1986)	6, 9, 10
<u>State v. Madry</u> , 12 Wn. App. 178, 529 P.2d 463 (1974).....	8
<u>State v. McCullum</u> , 98 Wn.2d 484, 656 P.2d 1064 (1983)	7
<u>State v. Nolan</u> , 141 Wn.2d 620, 8 P.3d 300 (2000)	13, 14
<u>State v. Sanchez</u> , 60 Wn. App. 687, 806 P.2d 782 (1991).....	11
<u>State v. Sinclair</u> , 192 Wn. App. 380, 367 P.3d 612 (2016)....	13, 15
<u>State v. Walker</u> , 136 Wn.2d 767, 966 P.2d 883 (1998).....	7
<u>State v. Williams</u> , 132 Wn.2d 248, 937 P.2d 1052 (1997)	6, 9, 10
<u>Washington v. Texas</u> , 388 U.S. 14, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967)	6

STATUTES & OTHER AUTHORITIES

11 WASH. PRAC., PATTERN JURY INSTR. CRIM. WPIC 17.01 (4th Ed)	8
16 WASH. PRAC., TORT LAW AND PRACTICE § 14:26 (4th ed.)	9
Former RCW 9.11.040	8

RAP 14.2	13
RAP 15.2	15
RCW 9A.16.020	7, 8
RCW 10.73.160	13
RCW 26.50.110	6
RESTATEMENT (SECOND) OF TORTS § 100	9
Wash. Const. art. I, § 22	6, 12
U.S. Const. amend. V	12
U.S. Const. amend. VI	6, 12
W. Page Keeton et al, PROSSER & KEETON ON LAW OF TORTS § 22 (5th ed. 1984)	8

I. ASSIGNMENTS OF ERROR

1. The trial court erred when it refused to include Appellant's proposed instruction on self-defense/defense of property.
2. The trial court erred when it ruled as a matter of law that a person does not have a right to use reasonable force to recover stolen property.
3. The trial court abused its discretion and denied Appellant his right to a fair trial when it allowed the State to reopen its case-in-chief after the defense had rested its case.
4. Any future request by the State for appellate costs should be denied.

II. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

1. Did the trial court err when it found as a matter of law that Appellant was not entitled to use reasonable force to recover the cellular telephone that he believed had been unlawfully taken from him by the alleged victim, where our criminal laws, common laws, and tort laws all establish that a person is entitled to use reasonable force to recover personal property that has been unlawfully taken from them?
(Assignments of Error 1 & 2)
2. Was Appellant denied his right to have the jury instructed on

his theory of the case when the trial court refused to instruct on the legal concept of self-defense/defense of property, where the evidence supported Appellant's claim and where the law allows a person to use reasonable force to recover personal property that has been unlawfully taken from them?
(Assignments of Error 1 & 2)

3. Did the trial court abuse its discretion and deny Appellant his right to a fair trial when it allowed the State to reopen its case-in-chief in order to call the alleged victim to testify, where Appellant had already testified and the defense had rested its case, and where the State's failure to timely call the witness was due to its own mismanagement?
(Assignment of Error 3)

4. If the State substantially prevails on appeal and makes a request for costs, should this Court decline to impose appellate costs because Appellant does not have the ability to pay costs, he has previously been found indigent, and there is no evidence of a change in his financial circumstances? (Assignment of Error 4)

III. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

The State charged Steven Brian Yelovich with one count of felony violation of a domestic violence court order (RCW 26.50.110) and one count of bail jumping (RCW 9A.76.170). (CP 3-4, 45-46, 47-48) The jury convicted Yelovich as charged. (CP 62-65; RP 432-33) The trial court imposed a standard range sentence of 15 months, and ordered Yelovich to pay only mandatory legal financial obligations (LFOs). (CP 101-02, 104; RP 458, 461) Yelovich timely appealed. (CP 113)

B. SUBSTANTIVE FACTS

On the morning of June 7, 2015, Andrew Norman was driving home from work when he noticed out of the corner of his eye what appeared to be an altercation between a man and a woman. (RP 124, 125-26) He stopped his car and got out. (RP 127) The woman was on the ground and the man was straddling her. (RP 125-26) Norman thought the man struck the woman, but he was not sure. (RP 127, 137) He also thought the man pulled the woman off the ground and then slammed her back down again. (RP 127, 137) Norman testified that the man seemed angry and the woman was crying. (RP 129)

Norman yelled at the man to leave the woman alone, and the man stopped and stood up. (RP 128) Norman called 911 and, at the woman's request, asked for both police and medics to respond. (RP 132) As they waited, the man told Norman that the woman had stolen his cellular telephone. (RP 134) Norman testified that the man was not confrontational and did not flee when the police arrived. (RP 141)

Pierce County Sheriff's Deputy Eric Lopez responded to Norman's 911 call. (RP 147, 149) He contacted the woman after the medics finished treating her. (RP 150) Deputy Lopez testified that the woman, Faith De Armond, was acting odd, had trouble focusing and responding to questions, and appeared intoxicated. (RP 150, 151-52) He noticed that she had some redness and a small laceration on her elbow. (RP 152-55)

Deputy James Oleole also responded, and contacted the man, Steven Yelovich. (RP 184, 185) When the officers learned of a court order prohibiting Yelovich from contacting De Armond, Deputy Oleole placed Yelovich under arrest. (RP 157-60, 187; Exh. P1)

De Armond testified that she and Yelovich had dated for several years. (RP 321, 322, 323) She saw Yelovich that morning

at a friend's house and things were fine, but he seemed to be getting upset so she left. (RP 327) As she was walking down the street, Yelovich arrived in his car, ran up to her and pushed her to the ground. (RP 328-23, 333) According to De Armond, Yelovich tried to grab her purse, hit her with his elbows, and punched her in the face. (RP 333, 349-50, 353)

Yelovich testified that he was moving his belongings from the garage of his son's house, when he noticed De Armond walk past the house. (RP 245, 247, 248) He walked to his car to put a box inside, and noticed that several items, including his cellular telephone, were missing. (RP 248) He looked down the street towards De Armond, and saw her look back nervously. (RP 249) Yelovich thought she must have stolen his telephone, so he got in his car and followed her so he could try to get it back. (RP 249)

Yelovich approached De Armond and asked her to return his telephone, but she turned and swung her purse at him. (RP 249) He grabbed the purse and tried to yank it from her, all the while asking her to return his telephone. (RP 249-50) De Armond fell to the ground, and they continued to struggle over the purse. (RP 250, 282) Yelovich denied striking or putting his hands on De Armond. (RP 282)

IV. ARGUMENT & AUTHORITIES

A. YELOVICH WAS ENTITLED TO A SELF-DEFENSE/DEFENSE OF PROPERTY JURY INSTRUCTION BECAUSE A PERSON IS ENTITLED TO USE REASONABLE FORCE TO RETRIEVE STOLEN PROPERTY AND BECAUSE THE FACTS SUPPORT THE INSTRUCTION IN THIS CASE.

The Sixth Amendment to the United States Constitution and art. 1, § 22 of the Washington Constitution grant criminal defendants the right to present a defense. See Washington v. Texas, 388 U.S. 14, 23, 87 S. Ct. 1920, 1925, 18 L. Ed. 2d 1019 (1967); State v. Hudlow, 99 Wn.2d 1, 14-15, 659 P.2d 514 (1983). A defendant is also entitled to have the jury instructed on his theory of the case if there is evidence that supports the theory. State v. Williams, 132 Wn.2d 248, 259, 937 P.2d 1052 (1997) (citing State v. Hughes, 106 Wn.2d 176, 191, 721 P.2d 902 (1986)). It is reversible error to refuse to instruct the jury on an affirmative defense where a defendant has met this burden. Williams, 132 Wn.2d at 260 (citing State v. Griffin, 100 Wn.2d 417, 420, 670 P.2d 265 (1983)).

The crime of violating a domestic violence court order is a gross misdemeanor, but is elevated to a class C felony if the violation involves an assault. RCW 26.50.110(1)(a), .110(4). The State charged Yelovich with felony violation of the court order,

alleging that he assaulted De Armond. (CP 47-48) It is a defense to a charge of assault that the force used was lawful. See State v. McCullum, 98 Wn.2d 484, 494, 656 P.2d 1064 (1983) (self-defense negates the intent element of a crime). Use of force is lawful when used by a party “in preventing or attempting to prevent ... a malicious trespass, or other malicious interference with real or personal property lawfully in his or her possession,” so long as the force “is not more than is necessary.” RCW 9A.16.020(3).

Yelovich asked the trial court to instruct the jury that it could acquit if it found that he used reasonable force to defend himself or his property. (CP 58; RP 380-81) The trial court denied the request because, in the court’s opinion, a person cannot use reasonable force to retrieve property:

I am unwilling to instruct the jury that as a matter of law he could use force to get back a cell phone that he believed had been wrongly taken. The law doesn’t support that. He was acting offensively, not defensively to protect property. So I cannot and will not instruct on the use of force to protect property under these circumstances.

(RP 382) The trial court was incorrect.¹

The right to use reasonable force to prevent damage to or

¹ When the trial court’s refusal to give an instruction is based on a ruling of law, the appellate court reviews the decision *de novo*. State v. Walker, 136 Wn.2d 767, 772, 966 P.2d 883 (1998).

recapture personal property is well recognized. RCW 9A.16.020

states, in pertinent part:

The use, attempt, or offer to use force upon or toward the person of another is not unlawful in the following cases:

...

(3) Whenever used by a party about to be injured, or by another lawfully aiding him or her, in preventing or attempting to prevent an offense against his or her person, or a malicious trespass, or other *malicious interference with real or personal property* lawfully in his or her possession, in case the force is not more than is necessary.

(Emphasis added.) Under this statute, “[t]he use of force to recover property is sanctioned in some instances.” State v. Madry, 12 Wn. App. 178, 180, 529 P.2d 463 (1974) (interpreting RCW 9A.16.020’s identical predecessor statute, Former RCW 9.11.040).²

There appear to be no published Washington cases directly applying this rule in a criminal case. But it is well established under both common law and tort law that a person is immune from liability for the use of reasonable force to recover stolen personal property. See W. Page Keeton et al, PROSSER & KEETON ON LAW OF TORTS § 22, at 137 (5th ed. 1984) (one of the privileges “recognized” in American law is “[t]he privilege of an owner dispossessed of his

² “Because the language of RCW 9A.16.020 is identical to the former statute, RCW 9.11.040, cases decided under the former statute should be applicable.” 11 WASH. PRAC., PATTERN JURY INSTR. CRIM. WPIC 17.01 (4th Ed).

chattel to recapture it by force against the person”); RESTATEMENT (SECOND) OF TORTS § 100 (“[t]he use of force against another for the sole purpose of retaking possession of a chattel is privileged if ... [certain] conditions ... exist”); 16 WASH. PRAC., TORT LAW AND PRACTICE § 14:26 (4th ed.) (“One whose possession” of personal property “is momentarily interrupted may use reasonable force to retake possession”).³ Therefore, the trial court was clearly wrong when it denied Yelovich this instruction based on an incorrect understanding of the law.

A defendant is entitled to have the jury instructed on his theory of the case if there is evidence to support the theory. Williams, 132 Wn.2d at 259-60; State v. Hughes, 106 Wn.2d 176, 191, 721 P.2d 902 (1986). In this case, Yelovich testified that he confronted De Armond moments after he believed she stole his cellular telephone and demanded she return it. (RP 249) When she did not, he grabbed and pulled on her purse in an effort to retrieve his telephone. (RP 249-50) Thus, Yelovich presented sufficient facts to support giving the requested self-defense/defense

³ The time between the taking and the attempt at recapture must be short, and the force used must be reasonable and be preceded by a verbal demand for the return of the property. See 16 WASH. PRAC., TORT LAW AND PRACTICE § 14:26 (citing RESTATEMENT (SECOND) OF TORTS § 101-105).

of property instruction, and he was entitled to have the jury instructed on this law.

Failure to give a self-defense instruction when warranted is prejudicial error. Williams, 132 Wn.2d at 259-60; Hughes, 106 Wn.2d at 191. By refusing to instruct the jury that Yelovich's use of force could be lawful and justified, the trial court denied Yelovich his right to argue his theory of the case to the jury. And without this instruction, the jury did not know that they could acquit Yelovich if they found his testimony more credible than De Armond's testimony. Yelovich's conviction for felony violation of a court order must therefore be reversed.

B. THE TRIAL COURT ABUSED ITS DISCRETION AND DENIED YELOVICH A FAIR TRIAL WHEN IT ALLOWED THE STATE TO REOPEN ITS CASE AFTER THE DEFENSE RESTED EVEN THOUGH THE STATE'S FAILURE TO CALL DE ARMOND SOONER WAS DUE TO THE STATE'S OWN MISMANAGEMENT,

The State rested its case-in-chief without calling De Armond to testify because the State did not know where she was. (CP 233, 292-93) Yelovich then decided to testify on his own behalf, after which the defense rested its case. (RP 283, 303-04) The following week, the prosecutor informed the court and the defense that De Armond had recently been in custody and that her whereabouts were noted in the prosecutor's file. (RP 292) The prosecutor

asserted that he had not intentionally misrepresented her status, but acknowledged that he “should have known she was in custody[.]” (CP 292-93) The prosecutor asked to reopen the State’s case so that De Armond could testify. (RP 294-95)

Yelovich objected, arguing that the State had mismanaged its case by not making a genuine effort to locate De Armond, that the defense had not had the opportunity to interview her, and that tactical choices had been made (like Yelovich taking the stand) on the assumption that she would not testify. (RP 298-301, 303-04) The trial court found that Yelovich was not prejudiced by the State’s mistake, and allowed the prosecution to reopen its case. (RP 302, 306, 307)

“A motion to reopen a proceeding for the purpose of introducing additional evidence is addressed to the sound discretion of the trial court. The manner of exercising that discretion will not be disturbed on appeal absent manifest abuse. Abuse of discretion is discretion exercised on untenable grounds for untenable reasons.” State v. Sanchez, 60 Wn. App. 687, 696, 806 P.2d 782 (1991) (citation omitted).

The defendant must show prejudice from the manner in which the evidence was introduced. See State v. Brinkley, 66 Wn.

App. 844, 850-51, 837 P.2d 20 (1992). But a defendant also has the right to a fair trial, which includes the effective representation of counsel. Wash. Const. art. I, § 22; U.S. Const. amends. V, VI.

In this case, the manner in which the evidence was introduced was highly prejudicial and denied Yelovich a fair trial. Yelovich decided to waive his right not to testify only after the State rested and based his decision on his belief that De Armond would not testify. (RP 304-05) Yelovich was not given a meaningful opportunity to interview De Armond, as she was non-responsive when initially questioned during a short recess and was then immediately called to the stand. (RP 311-16, 318) And De Armond was the last person to testify before the jury, which placed an undue and unfair emphasis on her testimony. The prosecutor's failure to check his notes and to make any attempt to locate De Armond was obvious mismanagement, and the court's decision to allow the State to reopen its case was highly prejudicial. Therefore, Yelovich was denied his right to a fair trial and his convictions must be reversed.

C. ANY FUTURE REQUEST FOR APPELLATE COSTS SHOULD BE DENIED.⁴

Under RCW 10.73.160 and RAP Title 14, this Court may order a criminal defendant to pay the costs of an unsuccessful appeal. RAP 14.2 provides, in relevant part:

A commissioner or clerk of the appellate court will award costs to the party that substantially prevails on review, unless the appellate court directs otherwise in its decision terminating review.

But imposition of costs is not automatic even if a party establishes that they were the “substantially prevailing party” on review. State v. Nolan, 141 Wn.2d 620, 628, 8 P.3d 300 (2000). In Nolan, our highest Court made it clear that the imposition of costs on appeal is “a matter of discretion for the appellate court,” which may “decline to order costs at all,” even if there is a “substantially prevailing party.” Nolan, 141 Wn.2d at 628.

In fact, the Nolan Court specifically rejected the idea that

⁴ In State v. Sinclair, Division 1 concluded “that it is appropriate for this court to consider the issue of appellate costs in a criminal case during the course of appellate review when the issue is raised in an appellant’s brief.” 192 Wn. App. 380, 389-90, 367 P.3d 612 (2016). More recently, in State v. Grant, this Court disagreed with Sinclair and held that an appellant should object to the imposition of costs through a motion to modify a commissioner’s ruling ordering costs. 2016 WL 6649269 at *2 (2016). But Yelovich has included an objection to costs in this brief in the event that a higher court adopts the Sinclair reasoning at a future time, and because this Court also noted in Grant that “a defendant may continue to properly raise the issue of appellate costs in briefing or a motion for reconsideration consistently with Sinclair.” 2016 WL 6649269 at *2.

imposition of costs should occur in every case, regardless of whether the proponent meets the requirements of being the “substantially prevailing party” on review. 141 Wn.2d at 628. Rather, the Court held that the authority to award costs of appeal “is permissive,” so that it is up to the appellate court to decide, in an exercise of its discretion, whether to impose costs even when the party seeking costs establishes that they are the “substantially prevailing party” on review. Nolan, 141 Wn.2d at 628.

Should the State substantially prevail in Yelovich’s case, this Court should exercise its discretion and decline to award any appellate costs that the State may request. First, Yelovich owns no property or assets, has no savings, and has no job and no income. (CP 115-16) And the trial court declined to order any non-discretionary LFOs at sentencing in this case after finding that Yelovich was unlikely to have the ability to repay such costs. (CP 101-02; RP 458, 461) Thus, there was no evidence below, and no evidence on appeal, that Yelovich has or will have the ability to repay additional appellate costs.

Furthermore, the trial court found that Yelovich is indigent and entitled to appellate review at public expense. (CP 119-20) This Court should therefore presume that he remains indigent

because the Rules of Appellate Procedure establish a presumption of continued indigency throughout review:

A party and counsel for the party who has been granted an order of indigency must bring to the attention of the trial court any significant improvement during review in the financial condition of the party. The appellate court will give a party the benefits of an order of indigency throughout the review unless the trial court finds the party's financial condition has improved to the extent that the party is no longer indigent.

RAP 15.2(f).

In State v. Sinclair, Division 1 declined to impose appellate costs on a defendant who had previously been found indigent, noting:

The procedure for obtaining an order of indigency is set forth in RAP Title 15, and the determination is entrusted to the trial court judge, whose finding of indigency we will respect unless we are shown good cause not to do so. Here, the trial court made findings that support the order of indigency.... We have before us no trial court order finding that Sinclair's financial condition has improved or is likely to improve. ... We therefore presume Sinclair remains indigent.

192 Wn. App. 380, 393, 367 P.3d 612 (2016). Similarly, there has been no evidence presented to this Court, and no finding by the trial court, that Yelovich's financial situation has improved or is likely to improve. Yelovich is presumably still indigent, and this

Court should decline to impose any appellate costs that the State may request.

V. CONCLUSION

Yelovich was denied his right to present a defense and to have the jury instructed on his theory of the case when the trial court incorrectly concluded that an individual has no right to use reasonable force to reclaim stolen property. Yelovich was also denied his right to a fair trial when the court allowed the State to reopen even though it had mismanaged the case and even though calling De Armond at that point in the trial was highly prejudicial. For these reasons, Yelovich's convictions should be reversed. Lastly, this Court should decline any future request to impose appellate costs.

DATED: November 16, 2016



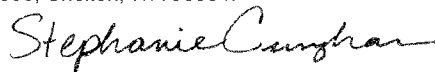
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CERTIFICATE OF MAILING

I certify that on 11/16/2016, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: Steven B. Yelovich, DOC# 337033, Washington Corrections Center, P.O. Box 900, Shelton, WA 98584.



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